

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: GENERIC PHARMACEUTICALS
PRICING ANTITRUST LITIGATION

MDL 2724
16-MD-2724
HON. CYNTHIA M. RUFE

THIS DOCUMENT RELATES TO:

THE KROGER CO., et al.,
Plaintiffs,
v.

ACTAVIS HOLDCO U.S., INC., et al.,
Defendants.

18-CV-284

**DEFENDANTS' RESPONSE TO THE
KROGER DIRECT-ACTION PLAINTIFFS' MOTION FOR LEAVE TO AMEND**

The Kroger Direct-Action Plaintiffs' ("Kroger DAPs")¹ September 4, 2020 motion for leave to file their 746-page second amended complaint (No. 18-cv-284, ECF No. 230-2) is their latest in a string of three such motions in the past two years. As set forth in the opposition papers to the Kroger DAPs' second motion for leave to amend, Defendants opposed the Kroger DAPs' motion because it was filed after the Court's deadline for amendments in Pretrial Order ("PTO") 61 and did not satisfy the good cause requirement of Federal Rule of Civil Procedure 16. No. 18-cv-284, ECF Nos. 206 (Opposition), 217 (Sur-Reply), 219 (Notice of Suppl. Auth.), 228 (Second Notice of Suppl. Auth.). Defendants' arguments apply equally to the Kroger DAPs' most recent motion for leave to amend, which has once again substantially changed the contours of their case after the PTO 61 deadline, without a showing of good cause. For these same reasons, their motion should be denied.

¹ The "Kroger DAPs" include The Kroger Co., Albertsons Companies, LLC, and H.E. Butt Grocery Company L.P.

Defendants are cognizant of the Court's statement at the most recent status conference on September 10, 2020 that it was inclined to set a deadline for amendments of December 15, 2020. In light of PTO 61's existing December 2018 deadline, it is unclear whether the Court's new contemplated deadline applies only to complaints not subject to PTO 61, unlike the Kroger DAPs' complaint. To the extent the Court intended to apply that new deadline to the Kroger DAPs, then Defendants expect the Court will grant their most recent motion for leave to amend. But, regardless, Defendants support the Court's stated intention to set a firm deadline, which is plainly within its discretion to do, and to hold all Plaintiffs to the good cause standard of Rule 16 thereafter. *Premier Comp Sols., LLC v. UPMC*, 970 F.3d 316, 319 (3d Cir. 2020) ("[W]hen a party moves to amend or add a party after the deadline in a district court's scheduling order has passed, the 'good cause' standard of Rule 16(b)(4) of the Federal Rules of Civil Procedure applies. A party must meet this standard before a district court considers whether the party also meets Rule 15(a)'s more liberal standard.").²

Specifically, at the September 10, 2020 status conference, the Court stated its intention to set a firm deadline "by which the Complaints are no longer amended and new Complaints are no longer filed," and indicated it was inclined to set December 15, 2020 as that deadline. 9/10/2020 Tr. (No. 16-md-2724, ECF No. 1519) at 42:23-43:1. The Court acknowledged that it cannot "ban all Complaints from being filed after that" but recognized it has the authority to "stop more consideration that impacts on our progress in our dates and times that we decide are the schedules." *Id.* at 43:2-5. Defendants agree, and respectfully request that the Court enter an

² For the avoidance of doubt, Defendants expressly preserve, and do not waive, all defenses and objections with respect to the Kroger DAPs' amended complaint, and any subsequent new complaints or amended complaints that may be filed by others, including but not limited to failure to state a claim, statutes of limitations, laches, and improper claim splitting.

Order establishing December 15, 2020 as the deadline, after which late-filed or late-amended complaints should be placed on a suspense docket.³

A definitive deadline of December 15, 2020 will allow the Court and the parties to determine the scope of the cases in the MDL and move those cases forward. As the Court is well aware, the scope of the cases in this MDL has expanded dramatically due to the repeated and continuous filing of new and amended complaints. The MDL now encompasses claims with respect to more than 200 pharmaceutical products, and includes dozens of single-drug cases, three separate but overlapping complaints by State Attorneys General Plaintiffs alleging various actions taken in furtherance of the same alleged overarching conspiracy, and multiple new and amended follow-on complaints filed by various private plaintiffs based on—and often repeating verbatim—the States’ allegations.

The Kroger DAPs’ recent motion for leave to amend underscores the need for a firm pleading deadline and strict adherence to that deadline. The Kroger DAPs initially filed a complaint on January 22, 2018. No. 18-cv-284, ECF No. 1. Then, on December 21, 2018, which was the deadline in PTO 61 to amend “any currently outstanding complaint,” the Kroger DAPs filed a First Amended Complaint (“FAC”) based on the allegations in the State Attorneys General Plaintiffs’ first overarching conspiracy complaint. *Compare* No. 18-cv-284, ECF No. 37, *with* No. 17-cv-3768, ECF No. 15. Motions to dismiss the Kroger DAPs’ FAC are pending.⁴ The Kroger DAPs then filed and withdrew two separate motions for leave to amend, followed by a third and currently pending motion for leave to amend seeking leave to file a proposed Second

³ For cases placed on the suspense docket, (1) all discovery relating to any pharmaceutical products or defendants unique to those late-filed or late-amended cases will be held in abeyance until further Court order, and (2) responses to any such complaints shall be stayed until further Court order.

⁴ 18-cv-284, ECF Nos. 74, 75, 76, 77, 78, 79, 81, 82, 86, 87, 90, 91, 92, 95.

Amended Complaint (“PSAC”) adding new defendants and more than 100 new pharmaceutical products to the pleading, based on allegations in the States’ second and third overarching conspiracy complaints. No. 18-cv-284, ECF Nos. 185, 194, 196, 229, 230, 231. In addition, JM Smith Corporation, whose subsidiary Smith Drug Corporation previously sought to be added as a plaintiff in one of the now-withdrawn proposed amended complaints by the Kroger DAPs, has filed a new, 746-page standalone complaint that is virtually identical to the Kroger DAPs’ current PSAC.⁵ No. 20-cv-4370, ECF No. 1.

At this stage of the proceedings, with discovery underway and the bellwether cases selected, continuing with a stream of new and amended complaints will undermine the progress of the MDL as well as any attempt at resolution. As the Court stated during the status conference: “We have to go with what we have. It’s time. . . . I’m not going backwards any longer. We’re going forwards.” 9/10/2020 Tr. at 43:7, 54:25-55:1. Accordingly, Defendants respectfully request that the Court set a firm deadline of December 15, 2020 for the filing of new and amended complaints.

⁵ JM Smith Corporation and the Kroger DAPs are represented by the same counsel.

Dated: October 2, 2020

Respectfully submitted,

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